United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21,357

JEROME S. MURRAY
Appellant

v.

UNITED STATES OF AMERICA
Appellee

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Richard W. Galiher
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Washington, D. C. - THIEL PRESS - 202 - 393-0625

STATEMENT OF QUESTIONS PRESENTED

Should the United States Government be impleaded as a third party defendant for contribution and/or indemnity in an action, wherein the plaintiff, a federal employee injured in the course of her employment, received Federal Employees Compensation Act benefits, and thereafter brought suit against the owner of the premises involved, which entire premises had been leased to the United States Government at the time of plaintiff's injuries?

INDEX

STATEMENT OF QUESTIONS PRESENTED i
JURISDICTIONAL STATEMENT 1
STATEMENT OF THE CASE 2
STATUTES INVOLVED 3
STATEMENT OF POINTS 5
SUMMARY OF ARGUMENT 5
ARGUMENT 7
CONCLUSION 16

TABLE OF CASES

Busey v. Washington, 225 F. Supp. 416 (D.C.D.C. 1964) 7, 10
Hart v. Simons, 223 F. Supp. 109 (D.C.E.D. Pa. 1963) 8, 10, 12
Hitaffer v. Argonne Co., 87 U. S. App. D. C. 57, 103 F 2d 811 (1950) 11
Martello v. Hawley, 112 U. S. App. D. C. 129, 300 F. 2d 721 (1962) 10, 12
Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U. S. 124 76 Sup. Ct. 232, 100 L. Ed. 133 (1956) 13, 14
Smither and Co., Inc., v. Coles, 100 U. S. App. D. C. 68, 242 F. 2d 220 (1957) 11
The Chicago, Rhode Island and Pacific Rwy. Co., v. U. S., (7th Circuit 1955) 13
Treadwell Construction Co. v. U. S., 372 U. S. 772, 83 Sup. Ct. 1102, 10 L. Ed. 2d 136 (1963) 8, 10
United States v. Yellow Cab Company, 340 U.S. 543, 71 Sup. Ct. 339, 9 L. Ed. 523 (1951) 8, 15
Weyerhaeuser Steamship Co. v. U. S., 372 U.S. 570, 83 Sup. Ct. 926, 10 L. Ed. 2d 1 (1963) 8, 10, 12

STATUTES

Federal Employees Compensation Act, 28 USC 751, et seq. 1. . . 7, 8

Federal Tort Claims Act, 28 USC 1346(b) 9

Longshoremen's and Harbor Workers' Compensation Act, 33USC 905 . . . . . 11, 13

Tucker Act, 28 USC 1346(a)(2) 15

MISCELLANEOUS

Moore's Federal Practice, Vol. 3 (2d Ed) Sec. 14.26 15

Moore's Federal Practice, Vol. 3 (2d Ed) Sec. 44.03(3) 15

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Appellant

v.

UNITED STATES OF AMERICA
Appellee

APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Suit has been filed by the plaintiff herein in the United States District Court for the District of Columbia, pursuant to 28 United States Code 1331, et seq. and purusant to Title 11, D. C. Code, Section 521, against the defendant-third party plaintiff herein; the third party plaintiff has sued the United States pursuant to Title 28, United States Code, Sec-

tion 1346(b) and Section 2671, et seq. This Court has jurisdiction over this appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

On September 14, 1962, plaintiff Alice W. Johnson filed suit against Jerome S. Murray, alleging that on October 20, 1961, while a passenger in an elevator located in the premises known as 400 Sixth Street, N. W., Washington, D. C., she was injured as a result of the fall on the elevator, which fall allegedly resulted from the negligence of defendant Murry as owner of the building in which the elevator was located. (JA 00)

Defendant Murray, on motion, was granted leave to file a third party complaint and on July 29, 1966, did file a third party complaint seeking contribution from the United States, which was the lessee of the entire building on the date of plaintiff's injuries and responsible for the maintenance of the elevator. On December 6, 1966, the United States moved for summary judgment. On February 21, 1967, this Court, with the consent of the defendant and the third party plaintiff Murray, granted summary judgment in favor of the United States and ordered that the third party complaint be dismissed. (JA 00)

Before the entry of this Order, the defendant-third party plaintiff on February 8, 1967, filed an Amended Third Party Complaint seeking indemnity from the United States. (JA 00). On March 27, 1967, the United States moved to dismiss the Amended Third Party Complaint; on April 27, 1967, the third party plaintiff filed his opposition to the Motion to Dismiss together with a Motion to Set Aside the Consent Order of February 21, 1967. The United States replied to the third party plaintiff's opposition, and opposed the Motion to Set Aside the Consent Order. After hearing, there was entered an Order granting the Motion of the United States to Dismiss the Amended Third Party Com-

plaint, and denying the Motion of the third party plaintiff to set aside the Consent Order of February 21, 1967.

On May 24, 1967, the third party plaintiff orally moved the Court to grant a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and this oral motion was opposed by the United States, the third party defendant. The Court, after hearing argument, and permitting the third party plaintiff to file a Rule 60(b), Federal Rules of Civil Procedure Motion to Vacate the Consent Order of February 21, 1967, said Motion being granted over opposition, entered a final order on September 1, 1967, which final order rescinded in part, the Order of May 19, 1967, granting summary judgment on the original Third Party Complaint, directing that a final judgment be entered, and revised the Order of May 19, 1967, which Order granted summary dismissal on the Amended Third Party Complaint, insofar as the Court directed the entry of a final judgment on that order. Since final judgments were entered on the original and Amended Third Party Complaints, the third party plaintiff filed a Notice of Appeal from the Order of September 1, 1967.

STATUTES AND RULES INVOLVED

The Federal Tort Claims Act, Title 28, United States Code, Section 1346(b):

> "...The District Courts...shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The Tucker Act, Title 28, United States Code, 1346(a)(2):

> "The District Court shall have original jurisdiction, concurrent with the Court of Claims, of: (2) any other civil action of claim against the United States not exceeding $10,000 in amount, founded...upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Federal Employees Compensation Act, 5 United States Code, Section 757, (b), et seq.:

> "(b) The liability of the United States...with respect to the injury or death of an employee shall be exclusive and in place of all other liability of the United States...to the employee, his legal representative, spouse, dependents, next of kin, and any one otherwise entitled to receive damages from the United States...on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty or by proceedings whether administrative or judicial, under any other workmen's compensation law or under any federal tort liability statute..."

Title 28, United States Code, Section 2674

> "The United States shall be liable, respecting the provisions of this Title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances..."

Longshoremen's and Harbor Workers' Compensation Act, 33 United States Code 905:

> "The liability of an employer...shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer...on account of such injury or death..."

STATEMENT OF POINTS

1. The Trial Court erred in granting Summary Judgment in favor of the third party defendant, United States of America, on the Third Party Complaint seeking contribution and in holding that Title 28, United States Code 757, the Federal Employees Compensation Act precluded a third party action for contribution from the United States when the injured plaintiff was an employee of the United States Government.

2. The Trial Court erred in dismissing the Amended Third Party Complaint seeking indemnification from the United States Government and in holding that the Federal Employees Compensation Act, Title 28, United States Code 757, precluded a third party action for indemnity from the United States when the injured plaintiff was an employee of the United States Government.

3. The Trial Court erred in ordering dismissal of the Amended Third Party Complaint seeking indemnification from the United States of America and in holding that the Court lacked jurisdiction under the Tucker Act, 28 United States Section 1346(a)(2).

SUMMARY OF ARGUMENT

The rulings of the lower court in this litigation have precluded the appellant-third party plaintiff herein from asserting any third party action against the United States. At the time of the happening of the accident giving rise to this litigation, the original plaintiff was an employee of the United States Government, injured on the premises of the defendant-third party plaintiff, while said premises were leased in their entirety to the United States and within the exclusive control of the United States. Any responsibility and final liability for the plaintiff's injuries rests with the United States Government; the Government has, however, through the *Federal Employees Compensation Act*, 28 United States Code 751, et seq., compensated the plaintiff

for both medical expenses and disability compensation. In defense to the third party actions for contribution and/or indemnity the Government has relied upon the exclusive nature of the *Federal Employees Compensation Act*, 28 United States Code 757(b) and upon the provisions of the *Tucker Act*, 28 United States Code, 1546(a)(2). The position taken by the Government is essentially that the exclusive nature of the *Federal Employees Compensation Act* precludes a third party action for contribution when the plaintiff was an employee of the United States Government at the time of the injury and the recipient of compensation benefits under the Act, and that the *Tucker Act* preclude a third party complaint for indemnity in the United States District Court in excess of $10,000, since the action is contractual, not sounding in tort.

This is a case of first impression in this Court. The appellant herein, the third party plaintiff, asserts that the exclusive nature of the *Federal Employees Compensation Act*, was neither designed nor intended to affect independent causes of action of unrelated third persons such as those seeking contribution, and/or indemnity and that the *Tucker Act* was not intended nor designed to affect the ancillary jurisdiction of the United States District Courts in determining quasi-contractual actions involving essentially issues of tort liability.

ARGUMENT

1. The Trial Court erred in granting Summary Judgment in favor of the third party defendant, United States of America, on the Third Party Complaint seeking contribution and in holding that Title 28 United States Code 757, the Federal Employees Compensation Act precluded a third party action for contribution from the United States when the injured plaintiff was an employee of the United States Government.

The issues raised in this appeal are matters of first impression in this jurisdiction. As set forth in the Statement of the Case herein, the plaintiff herein filed a suit against the defendant-third party plaintiff alleging that the negligence of the defendant-third party plaintiff proximately caused injuries sustained by the plaintiff while a passenger on an elevator located on the premises owned by the defendant-third party plaintiff. At the time of plaintiff's alleged injury, she was an employee of the United States Government and the United States Government was the lessee of the premises wherein plaintiff's accident and injuries occurred. The plaintiff did in fact receive medical expenses and disability compensation under the *Federal Employees Compensation Act*, Title 5, United States Code 751, et seq., in the total amount of $3,245.58. The defendant-third party plaintiff (appellant herein) filed his original Third Party Complaint seeking contribution against the United States alleging that the entire premises upon which the plaintiff was injured had been leased to the United States, that the duty to maintain the building was imposed upon the United States, and that any liability sustained by the defendant-third party plaintiff would have been caused in whole or in part by the negligence of the United States.

The Motion for Summary Judgment filed by the United States as the third party defendant, set for the exclusive liability provisions of the *Federal Employees Compensation Act*, 5 USC 757(b), and cited the District of Columbia case of *Busey v. Washington*, 225 F. Supp. 416 (D.C.D.C. 1964) wherein it was held that the exclusive liability provision in

the *Federal Employees Compensation Act* constituted a legal bar to the recovery of contribution from the United States as a joint tort feasor, by a third party plaintiff, where the plaintiff was a civilian employee of the United States and had received benefits under the said Act. In that case, the plaintiff was a civilian employee of the United States Government and a passenger in a United States Government mail truck at the time of the accident giving rise to his injuries. The defendant-third party plaintiff was a private citizen and attempted to implead as a third party for contribution the United States Government. The Trial Court held that to permit the third party action would be contrary to the Congressional purpose underlying the Act and accordingly, a Motion for Directed Verdict was granted in favor of the Government.

However, in the case of *Hart v. Simons* (DCED Pa 1963) 223 F. Supp. 109, a case completely analogous in its facts and issues, the Court stated:

> "...it must be concluded also that there is no evidence that Congress in enacting the exclusive liability section of the Federal Employees Compensation Act was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of the law of contribution or indemnity affecting the mutual rights and liabilities of parties in tort cases."

The Court denied the Government's Motion to Dismiss the Third-Party Complaint. In so ruling, the District Court for the Eastern District of Pennsylvania referred to the cases of *United States v. Yellow Cab Company*, 340 U. S. 543, 71 Sup. Ct. 339, 99 L. Ed. 2d 523 (1951), *Treadwell Construction Company v. United States*, 372 U. S. 772, 83 Sup. Ct. 1102, 10 L. Ed. 2d. 136, (1963) and *Weyerhaeuser Steamship Company v. United States*, 372 U. S. 570 83 Sup. Ct. 926, 10 L. Ed. 2d, 1 (1963).

The case of *United States v. Yellow Cab Company*, supra, established the right of a litigant to sue the United States

on a third party defendant for contribution on the basis of joint negligence, within the structure of the Federal Tort Claims Act, 28 United States Code, 1346(b). The *Weyerhaeuser* case, supra, involved a factual situation wherein the plaintiff was an employee of the United States Government at the time of his accident, and had received compensation under the Federal Employees Compensation Act. The owner of the private vessel sued the United States as the owner of the colliding vehicle and the United States sued the owner of the private vehicle, each alleging that the negligence of the other caused the accident. Factually, each was found to have been guilty of negligence and under the applicable admiralty rule, each was required to pay half the damages incurred by the owner of the other ship. The owner of the private ship contended that its damages, half to be paid by the United States, included the sum it had paid to the Federal Employee on the United States ship. The Government contended that the exclusive liability section of the Federal Employees Compensation Act limited the liability of the United States to the compensation which it had paid under the Act. The Court stated:

> "The purpose of 7(b), added in 1949, was to establish that as between the Government on the one hand, and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third parties much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private ship owners in collision cases."

This rationale acknowledging the limited effect of the act within the relationship of the employee and the Government should be applied in the present case without circumscribing and limiting the rights of the unrelated third party, the defendant-third party plaintiff herein. Acceptance of this rationale is justified insofar as it preserves the basic rights of the unrelated third party without obvious detriment to

him, avoids multiplicity of suit, and rightfully places before the Court that party which claims to have "settled" liability to the plaintiff.

In the District of Columbia case of *Martello v. Hawley*, 112 U. S. App. D. C. 129, 800 F. 2d 721 (1962), this Court affirmed the proposition that a joint fortfeasor who had settled with the plaintiff, receiving a release limited to him, should be brought before the Court as a third party defendant even though further liability was precluded by the release. The presence of the released joint tortfeasor had the effect of limiting the plaintiff's right to recovery against the joint tortfeasor who had not settled; a determination of negligence against both tortfeasors resulted in limiting the plaintiff's recovery to one half of the verdict. Since all the parties are before the Court, all rights and liabilities are properly determined. The rationale in the *Martello* case, supra, adopted by this Court, conform with the reasoning set forth in the *Hart* case, supra. Similarly, adoption by this Court of the decision and rationale in the *Hart* case, supra, would conform with the purpose and logic found in the *Martello* decision. The United States Government in the present case, is contending that its liability to the plaintiff is "settled" and that it should not be required to respond further in any manner; this is contrary to the rationale underlying the *Martello* case, supra.

The lower court of this jurisdiction in *Busey*, supra, considered the same cases as the Eastern District of Pennsylvania and concluded that the rationale in the *Weyerhaeuser* case, supra, was limited only to the "Admiralty Rule" involved in that litigation. Since a case of first impression is presented to this Court, the merit of that conclusion should be determined by this Court with its ramifications.

Significantly, the third case considered by both courts, *Drake v. Treadwell Construction Company*, supra, was remanded by the Supreme Court of the United States for further consideration in light of the *Weyerhaeuser* case, supra.

The issue presented is therefore unprecedented in this Court and of great importance.

The general effect of the "exclusive" provision of compensation acts, specifically the analogous language contained in the *Longshoremen's and Harbor Workers' Compensation Act*, 33 United States Code, Section 905, was considered in the District of Columbia case of *Hitaffer v. Argonne Company* 87 U. S. App. D. C. 57, 163, F. 2d 811 (1950) and this Court at that time ruled that an action by a wife for loss of consortium due to the negligent injury to her husband was not precluded by the said statutory provision. In *Smither and Company, Inc. v. Coles*, 100 U. S. App. D. C. 60, 242 F. 2d 220 (1957), this Court overruled its decision in *Hitaffer*, supra, and held that a claim for loss of consortium was precluded by the "exclusive" provision of the *Longshoremen's and Harbor Workers' Compensation Act*. However, three members of this Court dissented from that opinion and held that the spouse's right to damages for loss of consortium is not a claim "under or through the employee." The Court went on to state, in the dissent:

> "Furthermore, the spouse is given no quid pro quo as a substitute for her excluded claim. In contrast with the employee, her right is extinguished under this Court's present ruling with no assured or other compensation."

The right to maintain a third party action for contribution is an independent right of an unrelated third party in this case insofar as the third party plaintiff is seeking to determine his relationship with the United States Government, the third party defendant, rather than these rights or limitations existing within the relationship of employer-employee. If the United States Government was required by decision of this Court to remain a party defendant in the case and to defend the allegations of negligence asserted against it, the trial court would receive the complete evidence in the case and be fully apprised of the respective position of all the parties, and therefore, able to render the

proper decision. Unquestionably, the United States has an interest in this litigation insofar as the defendant has taken the position that the ultimate responsibility and liability in the case rests not with the defendant-third party plaintiff, but with the United States of America, through its agency and instrumentality. Whether or not the United States Government could be made to respond in further damages is a question apart from the requirement that the United States be a party and defend the third party allegation. As in the case of *Martello*, supra, by analogy, the plaintiff voluntarily assumes through Government employment, the limitations of federal statutory provisions affecting *her* potential causes of action. The said provisions should not be construed and interpreted to the detriment of an unrelated third party, but be enforced to limit only the plaintiff-federal employee's right of recovery. Clearly, this was the Congressional intent in enacting "exclusive" liability provision within the Compensation Act. The rationale in the *Weyerhaueser* case, supra, sufficiently demonstrates the just and equitable approach as adopted by the Eastern District of Pennsylvania in the case of *Hart*, supra.

2. The Trial Court Erred in Dismissing the Amended Third Party Complaint Seeking Indemnification From the United States Government in Holding That the Federal Employees Compensation Act, Title 28, United States Code 757, Precluded a Third Party Action for Indemnity From the United States When the Injured Plaintiff Was an Employee of the United States Government.

The Amended Third Party Complaint Filed by the defendant-third party plaintiff (appellant) sought indemnification from the United States of America on the theory that the Government impliedly contracted in the leasing agreement to maintain the premises in a safe manner for the benefit of invitees. In undertaking to maintain the premises, the service so provided by the Government necessarily is warranted to be accomplished in a reasonably safe manner. The right of indemnification from the party charged

with the positive duty to provide safe premises is adequately supported in case law, and the right to sue the United States in a third party action for indemnification is well established. *Ryan Stevedoring Company v. Pan Atlantic Steamship Corporation* 350 U. S. 124, 76 Sup. Ct. 232, 100 L. Ed. 183, (1956); *The Chicago, Rhode Island and Pacific Railway Company v. United States,* (7th Circuit 1955) 220 F. 2d 939; *Smither and Company, Inc.*, supra.

In the *Ryan* case, supra, a *Longshoremen's and Harbor Workers' Compensation Act* was involved wherein an employee of the petitioner, Ryan Stevedoring Company, was injured, received compensation payments from petitioner's insurance carrier, and then filed suit against the respondent-shipowner. The shipowner filed a third party complaint against the petitioner-employer for indemnification. Although no express contract of indemnity existed, the Court stated, in upholding the third party complaint:

> "The act nowhere expressly excludes or limits a shipowner's right as a third person, to insure itself against such a liability either by a bond of indemnity, or the contractor's own agreement to save the shipowner harmless. Petitioner's agreement in the instant case amounts to the latter for as will be shown, it is a contractual undertaking to stow the cargo 'with reasonable safety' and then to save the shipowner harmless from the petitioner's failure to do so...The third party Complaint is grounded upon the contractor's breach of its purely concensual obligations *owing to the shipowner* to stow the cargo in a reasonably safe manner."

The Supreme Court of the United States in the *Ryan* case, supra, went on to state that the shipowner's action for indemnity was not based merely on the ground that the shipowner and contractor each is responsible in some related degree for the tortious stowage of cargo that caused injury to the plaintiff. However, the Court does not rule out an action based on this ground which would require a determination of primary and secondary or active and passive negli-

gent conduct. Unquestionably, the distinction between an action essentially in contract and an action essentially in tort is a subtle and technical distinction. The theory of non-contractual indemnity has been recognized and permitted; the theory simply, but accurately states that one who undertakes a certain service to another, in the absence of a contract of indemnity, express or implied, warrants that the service performed by him will be undertaken and accomplished in a reasonable, safe manner.

Since the defendant-third party plaintiff in the present case attempted through an Amended Third Party Complaint to claim indemnification, the Government moved to dismiss that Amended Third Party Complaint by asserting that it was essentially an action *ex contractu*, and since an amount in excess of $10,000 was involved, the District Court was without jurisdiction. Yet it is quite possible for a verdict to be rendered in an amount less than $10,000.

As in the *Ryan* case, supra, the mere inception of the claim arises from the indemnitor's obligation to perform the service undertaken, and in the present case, no express contract of indemnity existed. The indemnitor, the United States of America, did in the leasing agreement assume the responsibility for the maintenance of the premises which it occupied. Every other issue which could possibly be presented in this litigation respecting the liability of the United States on an indemnity theory would be decided on the basis of tort law without reference to contract. Essentially, the third party action seeking indemnity filed by the defendant-third party plaintiff sounds in tort, although emanating from the respective positions of the third party plaintiff and third party defendant as lessor and lessee. It is respectfully urged that the Court recognize the essential nature of the claim for indemnity and, in conjunction with those points raised in the third portion of Argument in this Brief, uphold the right of the plaintiff-third party defendant to maintin in the lower court his action for indemnity.

3. The Trial Court Erred in Ordering Dismissal of the Amended Third Party Complaint Seeking Indemnification From the United States of America in Holding That the Court Lacked Jurisdiction Under the Tucker Act, 28 United States Code Section 1346(a)(2).

The plaintiff-third party defendant has attempted to assert a right of contribution and/or indemnity against the United States through third party practice pursuant to Rule 14 of the Federal Rules of Civil Procedure. The avoidance multiplicity of suits is encouraged by all courts for reasons of unnecessary time consumed and consistent results. In *United States v. Yellow Cab Company*, supra, the justification for third party practice was said to be "...to facilitate ...the trial of multiple claims which otherwise would be triable only in separate proceedings." And in *Moore's Federal Practice*, (Vol. 3, 2d Ed.) Section 14.26, it is stated that the great weight of authority is in accord with the view that third party claims are ancillary to the main claim and that independent jurisdiction should not be required; specific reference is made to diversity of citizenship and significantly, jurisdictional amount. The Government, in moving to dismiss the Amended Third Party Complaint seeking indemnity, asserted that the Tucker Act, 28 U.S. Code 1346(a)(2) required contract actions to be filed in the Court of Claims if involving an amount in excess of $10,000. If the third party claim asserted in the present litigation is deemed ancillary to the main claim, jurisdiction would vest in the District Court without limitation by jurisdictional amount, and a multiplicity of suits would be avoided.

In *Moore's Federal Practice*, Vol. 3 (2d Ed.) Section 44. 03(3) it is stated: "If there is a substantive right, procedure for its enforcement is established by Rule 14." The third party practice established by the Federal Rules of Civil Procedure should apply to permit the Amended Third Party Complaint to remain in the District Court. Since there is a substantive right to indemnification, the procedure under

Rule 14, third party practice, permits impleading of the party-indemnitor.

Under any one of the foregoing theories, the United States Government would properly be before the District Court thereby enabling the Court to resolve the interests of all the parties in one action.

CONCLUSION

In summary, the appellant herein urges this Court to reverse the rulings of the lower court and to permit the United States to be impleaded as a third party defendant in the lower court action on the grounds of contribution and/or indemnity.

Respectfully submitted,

Richard W. Galiher
William E. Stewart
William H. Clarke
David F. Grimaldi
Counsel for Appellant

CONTENTS OF JOINT APPENDIX

Complaint (Negligence)	1
Answer to Complaint	2
Third Party Complaint	2
Affidavit of Thomas A. Tinsley	4
Amended Third Party Complaint	5
Order filed Feb. 21, 1967	7
Order filed May 22, 1967	7
Order filed July 18, 1967	8
Memorandum and Order filed Sept. 1, 1967	9
Notice of Appeal	12

[Filed Sept. 14, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALICE W. JOHNSON
2705 Arlington Boulevard
Arlington, Virginia
Plaintiff

v.

JEROME S. MURRAY
303 Shoreham Building
Washington, D.C.
Defendant

Civil Action
No. 2941-62

COMPLAINT
(Negligence)

1. Plaintiff is a citizen of the State of Virginia and defendant is a citizen of the District of Columbia, and the cause of action complained of arose in the District of Columbia. The amount in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

2. On October 20, 1961, plaintiff was in a building at 400 - 6th Street, N. W., Washington, D. C., where plaintiff was employed.

3. The building at 400 - 6th Street, N. W., Washington, D. C. was owned at that time by the defendant.

4. While plaintiff was in the elevator in the said building, the elevator fell from the fifth floor to between the second and third floors, due to the negligence of the defendant.

5. As a result of the fall of the elevator, plaintiff sustained severe and permanent injuries to her head, left shoulder, arm, wrist, and foot, was confined to a hospital for a protracted period, was prevented from transacting her business, suffered great pain of body and mind, and incurred

expenses for medical attention and hospitalization in the amount of over $1,500.00.

WHEREFORE, plaintiff demands judgment against defendant in the sum of one hundred thousand dollars and costs.

Samuel C. Klein
Attorney for Plaintiff

[Filed December 20, 1962.]

ANSWER TO COMPLAINT

The defendant admits that the amount of this suit is in excess of $3,000.00, and the other allegations contained in paragraph one of the complaint; he is without information sufficient to answer the allegations contained in paragraph two of the complaint; he admits that he was an owner of premises 400-6th Street, N.W., on the date alleged; he is without information or belief sufficient to either admit or deny the allegations with respect to plaintiff's alleged accident, or as to her personal injuries or financial losses alleged to have resulted therefrom; he denies each and every other allegation contained in the complaint.

GALIHER & STEWART

By Richard W. Galiher
Attorneys for Defendant.

[Filed July 29, 1966.]

THIRD PARTY COMPLAINT

1. This Court has jurisdiction over this third party action pursuant to Title 28, United States Code, Sections 1346(b), 2671 et seq.

2. That the plaintiff herein filed suit against this defendant and third party plaintiff (attached hereto as Exhibit B) alleging in pertinent part that on or about October 20, 1961, the plaintiff, while a passenger in an elevator located in the premises known as 400 Sixth Street, N. W., Washington, D. C. was injured as a result of the fall of the elevator, which fall allegedly resulted from the negligence of this defendant and third party plaintiff as owner of the building in which the elevator was located.

3. That this defendant and third party plaintiff had leased the entire premises to the United States of America under the terms of which,

> "The Government shall, at its expense, furnish all necessary labor and material for the maintenance and custodial services of the building, including interior painting, maintenance of mechanical equipment, alterations or additions to the plumbing, heating and electrical facilities, partition work, floor covering, and any other physical improvements required for the specific needs of the Government."

That, if the elevator in which the plaintiff was a passenger did, in fact, fall causing plaintiff herein injuries and if the defendant and third party plaintiff is determined to be responsible for the injuries sustained, this liability will have been caused in whole or in part, by the negligence of the United States of America since the United States of America was in sole and exclusive possession of the premises and responsible for this maintenance thereof. Accordingly, this third party defendant is, or may be, answerable over to the defendant and third party plaintiff, all or a portion of any sum to which the plaintiffs herein may be entitled to recover from the defendant by reason of damages, if any, which may have been sustained.

WHEREFORE, the defendant and third party plaintiff, Jerome S. Murray, demands judgment against the third party defendant, the United States of America, for all or a contributable portion of any sum which may be adjudged

against the defendant and in favor of plaintiffs, together with all of the expenses incurred in connection with the defense of this action and all further and proper relief of the premises.

GALIHER, STEWART & CLARKE

By Richard W. Galiher
Attorney for Defendant

[Filed December 6, 1966.]

[Exhibit A - Attached to Government Motion for Summary Judgment.]

AFFIDAVIT

I, THOMAS A. TINSLEY, being duly sworn, do say and depose that:

1. I am the Director of the Bureau of Employees' Compensation of the United States Department of Labor, and that:
2. all rights and duties vested in the Secretary of Labor for the administration of Chapter 81, Public Law 89-554, 80 Stat. 531 (formerly known as the Federal Employees' Compensation Act, 5 U. S. C. 751 et seq., recodified September 6, 1966) has been delegated to me pursuant to the Act of March 4, 1913 (5 U. S. C. 611), R. S. 161 (5 U. S. C. 22) and Reorganization Plan No. 6 of 1950, and that:
3. the records of the Bureau of Employees' Compensation show that ALICE W. JOHNSON was an employee of the Forms Development Section, Publication Branch, Publishing Division, United States Air Force on October 20, 1961, and that:
4. on October 20, 1961, ALICE W. JOHNSON sustained an injury which injury the Bureau of Employees' Com-

pensation has determined was sustained in the course of her employment, and therefore:

5. ALICE W. JOHNSON was entitled to the benefits payable by the Bureau of Employees' Compensation by virtue of the provisions of Chapter 81 of Public Law 89-554, and therefore:

6. the Bureau of Employees' Compensation has paid to ALICE W. JOHNSON or on her behalf the sum of one thousand seven hundred eighty-eight dollars and eighty cents ($1,788.80) for medical expenses incurred as a result of the injury sustained by her; and, in addition, the sum of one thousand four hundred fifty-six dollars and seventy-eight cents ($1,456.78) for disability compensation.

Thomas A. Tinsley, Director
Bureau of Employees' Compensation

[Jurat dated December 2, 1966.]

AMENDED THIRD PARTY COMPLAINT

1. This Court has jurisdiction over this third party action pursuant to Title 28, United States Code, Sections 1346(b), 2671 et seq.

2. That the plaintiff herein filed suit against this defendant and third party plaintiff alleging in pertinent part that on or about October 20, 1961, the plaintiff, while a passenger in an elevator located in the premises known as 400 Sixth Street, N. W., Washington, D. C. was injured as a result of the fall of the elevator, which fall allegedly resulted from the negligence of this defendant and third party plaintiff as owner of the building in which the elevator was located.

3. That this defendant and third party plaintiff had leased the entire premises to the United States of America under the terms of which,

> "The Government shall, at its expense, furnish all necessary labor and material for the maintenance and custodial services of the building, including interior painting, maintenance of mechanical equipment, alterations or additions to the plumbing, heating and electrical facilities, partition work, floor covering, and any other physical improvements required for the specific needs of the Government."

4. That the plaintiff, Alice W. Johnson, was at the time of the accident which is the subject of this suit, an employee of the United States of America working in a building in which the accident occurred. That the third party defendant was required to provide a safe place for its employees, including the plaintiff, to work and that said third party defendant was negligent in maintaining, repairing and operating the elevator. That if the elevator in which the plaintiff was a passenger was in a defective condition as alleged by plaintiff and if the defendant and third party plaintiff is determined to be responsible for the injuries sustained, it is entitled to be fully indemnified by the United States of America for all sums that plaintiff may recover against it by virtue of its contract with the third party defendant.

WHEREFORE the premises considered, the defendant and third party plaintiff, Jerome S. Murray, demands judgment of and from the third party defendant, United States of America, for all sums that may be adjudged against defendant and third party plaintiff, Jerome S. Murray.

Richard W. Galiher
Attorney for Defendant and
Third Party Plaintiff

[Filed February 21, 1967.]

ORDER

Upon consideration of the motion of the third-party defendant, the United States of America, for summary judgment and the memorandum of points and authorities in support thereof; the consent of defendant and third-party plaintiff, Jerome S. Murray, affixed hereto; and it appearing to the Court that there exists no genuine issue of material fact, it is by the Court this 21st day of February, 1967,

ORDERED that the motion of the third-party defendant for summary judgment be, and the same hereby is, granted and that the complaint be, and the same hereby is, dismissed.

CONSENT:

RICHARD W. GALIHER
Attorney for Defendant and
Third-Party Plaintiff Murray

UNITED STATES DISTRICT JUDGE

[Filed May 22, 1967.]

ORDER

This matter having come before the Court on the motion of the third-party defendant, the United States of America, to dismiss the amended third-party complaint on the grounds that the Court lacks jurisdiction over the subject matter and that the amended third-party complaint fails to state a claim upon which relief can be granted, and defendant and third-party plaintiff Murray's motion to set aside the consent Order granting summary judgment, and upon consideration of the motions and the oppositions thereto and counsel having been heard; and the Court having considered the record and the memoranda filed by the parties, it is by the Court this 19th day of May, 1967

ORDERED:

1. That the motion of the defendant and third-party plaintiff Murray to set aside the consent Order be, and the same hereby is, denied;

2. That the original third-party complaint be, and the same hereby is, dismissed with prejudice;

3. That the motion of the third-party defendant, the United States of America, to dismiss the amended third-party complaint be, and the same hereby is, granted; and

4. That the amended third-party complaint be, and the same hereby is, dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

[Filed July 18, 1967.]

ORDER

Upon consideration of the defendant and third party plaintiff's Motion to Vacate the Consent Order Granting Summary Judgment to the Third Party Defendant, entered on February 21, 1967, and further consideration given to the Opposition filed by the third party defendant, it is this 18th day of July 1967:

ORDERED: That the Motion of the defendant and third party plaintiff to Vacate the Consent Order Granting Summary Judgment to the Third Party Defendant, dated February 21, 1967, be and hereby is granted, and the Order of February 21, 1967 be and hereby is set aside.

WILLIAM B. JONES, JUDGE

[Filed September 1, 1967.]

MEMORANDUM AND ORDER

On September 14, 1962, plaintiff Alice W. Johnson filed suit against Jerome S. Murray, alleging that on October 20, 1961, while a passenger in an elevator located in the premises known as 400 Sixth Street, N. W., Washington, D. C., she was injured as a result of the fall of the elevator, which fall allegedly resulted from the negligence of defendant Murray as owner of the building in which the elevator was located.

Defendant Murray, on motion, was granted leave to file a third-party complaint and on July 29, 1966, did file a third-party complaint seeking contribution from the United States, which was the lessee of the building on the date of plaintiff's injuries. On December 6, 1966, the United States moved for summary judgment on the ground that, plaintiff Johnson having been an employee of the United States at the time of her injury and having received benefits from the United States under the Federal Employees' Compensation Act, this Act barred the recovery of contribution from the United States by a third-party plaintiff. On February 21, 1967, this Court, with the consent of the defendant and the third-party plaintiff Murray, granted summary judgment in favor of the United States and ordered that the third-party complaint be dismissed.

Before the entry of this Order, the defendant and third-party plaintiff on February 8, 1967, filed an amended third-party complaint seeking indemnity from the United States on the basis of an express contract—the lease agreement—between the parties. On March 22, 1967, the United States moved to dismiss the amended third-party complaint on the grounds that (1) the claim sounded in contract and therefore did not fall within the purview of the Federal Tort Claim Act and (2) the Court lacked jurisdiction under the Tucker Act, 28 U.S.C. §1346(a)(2), since the claim exceeded $10,000.00. On April 27, 1967, the third-party plaintiff filed his opposition to the motion to dismiss, together with

a motion to set aside the Consent Order of February 21, 1967, relying upon *Hart v. Simons*, 223 F. Supp. 109 (D.C.E.D.Pa. 1963). On May 5, 1967, the United States replied to the third-party plaintiff's opposition, and opposed the motion to set aside the Consent Order. On May 22, 1967, after a hearing, there was entered an Order signed May 19, 1967, granting the motion of the United States to dismiss the amended third-party complaint, and denying the motion of the third-party plaintiff to set aside the Consent Order of February 21, 1967.

On May 24, 1967, the third-party plaintiff orally moved the Court to grant an interlocutory appeal from the Order entered May 22, 1967, under 28 U.S.C. §1292(b) or, alternatively, for the entry of a final judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure. The third-party defendant United States opposed both motions. At the hearing, the Court decided to notify the Order of May 22, 1967 (which had actually been signed May 19, 1967), granting the motion of the United States to dismiss the amended third-party complaint based on indemnity and agreed to sign an amended order directing the entry of final judgment as to the Motion to Dismiss, and also stated that it would direct the entry of final judgment with respect to its ruling whereby it refused to set aside a consent judgment heretofore entered into by the defendant and the United States dismissing the original third-party complaint based on contribution and hold that said judgment was likewise a final judgment for purposes of being appealed.

On June 5, 1967, the third-party plaintiff moved this Court, pursuant to Rule 60(b), F.R.Civ.P., to vacate the Consent Order of February 21, 1967. The third-party plaintiff asserted that legal research had failed to reveal any precedent which would substantiate its position and permit it to successfully oppose third-party defendant's Motion for Summary Judgment addressed to the original third-party complaint based on contribution and it had therefore filed an amended third-party complaint against the United States

based on indemnity and had consented to the third-party defendant's Motion for Summary Judgment as to the original third-party complaint. It further asserted that it subsequently discovered the case of *Hart v. Simons*, 223 F. Supp. 109 (D.C.E.D.Pa. 1963), which conflicted with the decision relied upon by the United States and which the third-party plaintiff believed supported its position that a claim for contribution would lie. It pointed out to the Court that, in consenting to the Order its comment was mistakenly given. On June 13, 1967, the United States filed its opposition to the motion to vacate the Consent Order, contending that (1) the Order of this Court, signed May 19, 1967, and docketed May 22, 1967, denying the motion of the defendant and third-party plaintiff to set aside the Consent Order, is the law of the case, and (2) that the defendant and third-party plaintiff has made no showing of extenuation so that his counsel's failure to discover the *Hart* case during a two-month period of legal research could be excusable within the meaning of Rule 60(b). On July 18, 1967, this Court granted the motion of the third-party plaintiff to vacate the Consent Order.

Accordingly, it is by the Court this 1st day of September, 1967,

ORDERED, ADJUDGED AND DECREED:

1. That the Order signed May 19, 1967, and docketed May 22, 1967, be, and the same hereby is, rescinded as to paragraph 2;

2. That the Motion of the third-party defendant, the United States of America, for summary judgment, filed December 6, 1966, on the third-party complaint seeking contribution be, and the same hereby is granted;

3. That the Clerk of this Court be, and he hereby is, directed to enter a final judgment upon the Order herein granting summary judgment, and the undersigned expressly determines that there is no just reason for delay in the entry of final judgment on this Order; and

4. That the Order, signed May 19, 1967, and docketed on May 22, 1967, be and it hereby is further revised to include the following paragraph:

5. That the Clerk of this Court be and he hereby is directed to enter a final judgment upon the Order herein dismissing with prejudice the amended third-party complaint, and the undersigned expressly determines that there is no just reason for delay in the entry of final judgment on this Order.

WILLIAM B. JONES
UNITED STATES DISTRICT
JUDGE

[Certificate of Service 1967.]

NOTICE OF APPEAL

Notice is hereby given this 8th day of September, 1967, that Defendant and Third Party Plaintiff, Jerome S. Murray, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 1st day of September, 1967 in favor of Third Party Defendant, United States of America, against said Defendant and Third Party Plaintiff, Jerome S. Murray.

GALIHER, STEWART & CLARKE

David F. Grimaldi
Attorney for Defendant
and Third Party Plaintiff

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 21,357

JEROME S. MURRAY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

ALAN S. ROSENTHAL,
DANIEL JOSEPH,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether Section 7(b) of the Federal Employees' Compensation Act, 5 U.S.C. 757(b), now 5 U.S.C. (1964 ed. Supp. II) 8116(c), bars a third-party complaint against the United States seeking contribution in connection with an injury to a government employee which was compensable under that Act?

2. Whether the district court lacked jurisdiction under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, of appellant's third-party claim for contractual indemnity against the United States in circumstances where (1) the original plaintiff's claim was for $100,000; and (2) the liability of the defendant-third-party plaintiff to the original plaintiff had not been established?

I N D E X

	Page
Counterstatement of the questions presented	1
Counterstatement of the case	1
Statutes involved	5
Summary of Argument	6
Argument	
I The District Court Correctly Granted Summary Judgment On The Original Third-Party Complaint For The Reason That The United States Was Not Liable To Appellant For Contribution	8
II The District Court Correctly Dismissed The Appellant's Claim For Contractual Indemnity For Lack Of Jurisdiction	19
Conclusion	21

CITATIONS

Cases:

Amaranth, The, 68 F. 2d 893, 895 (C.A. 2)	9
Bradford Electric Co. v. Clapper, 286 U.S. 145, 159	11,16
Brown v. American-Hawaiian S. S. Co., 211 F. 2d 16 (C.A. 3)	13
Busey v. Washington, 225 F. Supp. 416 (D. D.C.)	10,16, 17
Christie v. Powder Power Tool Corp., 124 F. Supp. 693 (D. D.C.)	10
Crawford v. Pope & Talbot, 206 F. 2d 784 (C.A. 3)	13
Drake v. Treadwell Construction Co., 299 F. 2d 789	10
Feres v. United States, 340 U.S. 135	14,15
Fleming v. Huebsch Laundry Corp., 159 F. 2d 581 (C.A. 7)	9
Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282	15
Hart v. Simons, 223 F. Supp. 109 (E.D. Pa.)	4,8,17
Herder Truck Lines v. United States, 335 F. 2d 261 (C.A. 5)	21
Lustgarten v. Belt & Tarrant Mfg. Co., 92 F. 2d 277, 279 (C.A. 3)	9
*Maddux v. Cox, 382 F. 2d 119 (C.A. 8)	7,12

* Cases chiefly relied upon are marked by asterisks.

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	Page
Counterstatement of the questions presented	1
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Drake v. Treadwell Construction Co., 299 F. 2d 789	10
Feres v. United States, 340 U.S. 135	14,15
Fleming v. Huebsch Laundry Corp., 159 F. 2d 581 (C.A. 7)	9
Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282	15
Hart v. Simons, 223 F. Supp. 109 (E.D. Pa.)	4,8,17
Herder Truck Lines v. United States, 335 F. 2d 261 (C.A. 5)	21
Lustgarten v. Felt & Tarrant Mfg. Co., 92 F. 2d 277, 279 (C.A. 3)	9
*Maddux v. Cox, 382 F. 2d 119 (C.A. 8)	7,12

* Cases chiefly relied upon are marked by asterisks.

Cases: (continued)

	Page
Martin Marietta Corp. v. Federal Trade Commission, 376 F. 2d 430, 433-434 (C.A. 7)	9
Martello v. Hawley, 112 U.S. App. D.C. 129, 300 F. 2d 721	18,19
McKenna v. Austin, 77 U.S. App. D.C. 228, 134 F. 2d 659	19
North Star, The, 106 U.S. 17	15
Pope v. United States, 323 U.S. 1, 11-12	9
Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124	19
Slattery v. Marra Bros., Inc., 186 F. 2d 134, 138-139 (C.A. 2), certiorari denied, 341 U.S. 915	13
Smither & Co., Inc. v. Coles, 100 U.S. App. D.C. 68, 242 F. 2d 220, 222, certiorari denied, 354 U.S. 914	11,18
Swift & Co. v. United States, 276 U.S. 311, 323-324	8
Thompson v. Maxwell Land Grant Co., 168 U.S. 451, 463	8
Underwood v. United States, 207 F. 2d 862, 864	12
United States v. Babbitt, 104 U.S. 767, 768	8
United States v. Gould, 301 F. 2d 353 (C.A. 5)	9
*United States v. Sherwood, 312 U.S. 584	7,20, 21
*United Airlines v. Wiener, 335 F. 2d 379 (C.A. 9), certiorari dismissed sub nom. United Air Lines v. United States, 379 U.S. 951	7,12, 14,17
Walling v. Miller, 138 F. 2d 629, 631 (C.A. 8), certiorari denied, 321 U.S. 784	9
Weyerhaeuser Steamship Co. v. United States, 372 U.S. 570	7,10, 15,17
*Wien Alaska Air Lines v. United States, 375 F. 2d 736 (C.A. 9), certiorari denied, 389 U.S. 940	7,12, 14,15

* Cases chiefly relied upon are marked by asterisks.

Cases cited:(continued)

	Page
Yellow Cab Co. of D.C. v. Dreslin, 86 U.S. App. D.C. 327, 181 F. 2d 626	13

Statutes:

Federal Employees' Compensation Act:	
Section 7(b) 5 U.S.C. 751	2
Section 7(b) 5 U.S.C. 757(b)(1964 ed.)	1,5,6, 9,11, 12,13
Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671	2
Longshoremen's and Harbor Workers' Act, Section 5, 33 U.S.C. 905	13,18
Tucker Act, 28 U.S.C. 1346(a)(2) 1491	1,3, 6,19

Miscellaneous:

7 Moore, Federal Practice ¶ 60.22 [2] at p. 233 (2d Ed. 1966)	9
2 Larson, Workmen's Compensation § 66.10 (1952)	12
2 Larson, Workmen's Compensation Law § 76.21	16
Prosser, Torts:	
§ 47 at p. 277	13
§ 48 at p. 281, fn. 10 (3d ed. 1964)	13
S. Rept. No. 836, 71st Cong., 1st Sess. (1949), p. 23	17
Rule 14, F. R. Civ. P.	21
Rule 54(b), F. R. Civ. P.	4
Rule 60(b), F. R. Civ. P.	4,8

* Cases chiefly relied upon are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 21,357

JEROME S. MURRAY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On September 14, 1962, Alice W. Johnson filed a complaint in the district court, alleging that on October 20, 1961, while in a building located at 400 6th Street, N. W., Washington, D. C., and owned by appellant Murray, she was injured when an elevator in which she was riding fell from the fifth floor to a place between the second and third

floors. The complaint alleged further that the accident had been caused by the negligence of appellant, and that the plaintiff had suffered severe and permanent injuries, was confined to a hospital for a long period, was prevented from transacting her business, and incurred medical and hospital bills of more than $1500. Judgment in the amount of $100,000 was sought (J.A. 1-2).

Appellant filed an answer to the complaint on December 20, 1962 (J.A. 2). Three and a half years later, on July 29, 1966, he filed a third-party complaint against the United States, alleging jurisdiction under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671. The third-party complaint, in addition to summarizing the allegations of the original complaint, alleged that the United States had been the lessee of the building in question at the time of the accident; that if the plaintiff had suffered injuries from an elevator accident in that building, that accident had been caused in whole or in part by the United States; and that the United States was liable over to the appellant in tort for "all or a contributable part of the damages" (J.A. 3-5).

On December 6, 1966, the United States moved for summary judgment on the third-party complaint, on the grounds (supported by the affidavit at J.A. 4-5) that the plaintiff was an employee of the United States at the time of the injury; that she had received benefits under the Federal Employees' Compensation Act, 5 U.S.C. 751, et seq.; and that, under the

terms of that Act, liability could not be imposed upon the United States on account of the employee's injury.

On February 8, 1967, appellant filed an amended third-party complaint, repeating the factual allegations and asserting that the United States was liable over to appellant in indemnity on the basis of the lease contract between appellant and the Government which was in effect at the time of the accident.

On February 21, 1967, the district court granted the motion of the United States for summary judgment and dismissed the original third-party complaint. The order of dismissal recites the consent of the appellant, and is subscribed by his counsel under the heading "Consent" (J.A. 7).

Thereafter, on March 22, 1967, the United States moved to dismiss the amended third-party complaint as well, urging that it stated only a claim in contract; that it did not therefore come within the purview of the Federal Tort Claims Act; and that the district court had no jurisdiction to hear a contract claim for more than $10,000 under the Tucker Act, 28 U.S.C. 1346(a)(2). On April 27, 1967, appellant filed an opposition to this motion, accompanying it with a motion to set aside the dismissal of the original third-party complaint.

On May 19, 1967, the district court signed an order which dismissed the original third-party complaint with prejudice, granted the motion to dismiss the amended third-party complaint, and refused to vacate the consent order dismissing

the original third-party complaint. This order was entered on May 22, 1967.

With both third-party complaints now dismissed and the original action still pending, appellant orally moved the district court, on May 24, 1967, to issue an interlocutory appeal certification with respect to the May 22 order or, in the alternative, to enter a final judgment on the third-party complaints under Rule 54(b), F.R. Civ. P., with the determination that there was no just reason for delay in entry of final judgment. On June 5, 1967, appellant additionally moved the court to set aside the February 21 consent order of dismissal, pursuant to Rule 60(b), F.R. Civ. P. The ground for this motion was that, before consenting to the February 21 order, the legal research of appellant's counsel had failed to uncover any legal support for his position and therefore he consented to dismissal; that subsequent to entry of the consent order of dismissal, however, and after renewed legal research, counsel found for the first time Hart v. Simons, 223 F. Supp. 109 (E.D. Pa.), a reported decision handed down in 1963, which supported his position; and that therefore his consent to the February 21 order had been mistakenly given. The United States opposed this motion.

On July 18, 1967, the district court granted the Rule 60(b) motion, and set aside the February 21 order (J.A. 8). On September 1, 1967, the district court rescinded the dismissal of the original third-party complaint, and granted

summary judgment in favor of the United States on the original third-party complaint, appending the determination that there was no just reason for delay in the entry of final judgment. In addition, the May 22 order was revised to dismiss with prejudice the amended third-party complaint, and to append a similar determination of no just reason for delay in entering final judgment (J.A. 9-12).

Notice of appeal was filed on September 8, 1967 (J.A. 12).

STATUTES INVOLVED

Section 7(b) of the Federal Employees' Compensation Act, 5 U.S.C. 757(b) (1964 ed.):[1/]

> (b) The liability of the United States or any of its instrumentalities under sections 751-756, 757-781, 783-791 and 793 of this title or any extension thereof with respect to the injury or death or an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: Provided, however, That this subsection shall not apply to a master or a member of the crew of any vessel.

1/ This statute was amended by Pub. L. 89-554, 80 Stat. 542, on September 6, 1966, and recodified. It now appears, with minor changes, at 5 U.S.C. 8116(c) (1964 ed., Supp. II).

The Tucker Act, 28 U.S.C. 1346(a)(2):

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

SUMMARY OF ARGUMENT

I

Appellant's original third-party complaint, seeking non-contractual contribution or indemnity from the United States, is barred by the exclusive liability provisions of the Federal Employees' Compensation Act, 5 U.S.C. 757(b). Under the express terms of the Act, the liability of the United States for the payment of compensation to its employee is "exclusive, and in place of all other liability of the United States to the employee * * * and anyone otherwise entitled to recover damages from the United States * * * on account of [the employee's] injury or death * * * under any Federal tort liability ~~law~~ statute" (emphasis supplied). Moreover, the courts of appeals have uniformly held that claims for non-contractual contribution or indemnity may not be asserted in the present circumstances because of the absence of any underlying governmental tort

liability to the injured employee. United Airlines v. Weiner, 335 F. 2d 379 (C.A. 9), certiorari dismissed sub nom. United Air Lines v. United States, 379 U.S. 951; Wien Alaska Air Lines v. United States, 375 F. 2d 736 (C.A. 9), certiorari denied, 389 U.S. 940; Maddux v. Cox, 382 F. 2d 119 (C.A. 8). As the Ninth Circuit recognized in United Airlines, Weyerhaeuser Steamship Co. v. United States, 372 U.S. 570, does not call for a different result.

II

The claim for contractual indemnity asserted in appellant's amended third party complaint was not cognizable by the district court under its Tucker Act jurisdiction. First, the claim exceeded $10,000 in amount. Second, the district court's Tucker Act jurisdiction is restricted to cases which could be entertained by the Court of Claims and the latter court may not consider a claim which, as the claim for contractual indemnity here, is still completely contingent in nature. United States v. Sherwood, 312 U.S. 584.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE ORIGINAL THIRD-PARTY COMPLAINT FOR THE REASON THAT THE UNITED STATES WAS NOT LIABLE TO APPELLANT FOR CONTRIBUTION.

Preliminarily, as noted above in the counterstatement of the case, the district court first dismissed the original third-party complaint, with the consent of the appellant. The appellant later moved the court to set aside the consent order of dismissal pursuant to Rule 60(b), F. R. Civ. P., upon the sole ground that only after the consent order had been issued did counsel for the first time discover Hart v. Simons, 223 F. Supp. 109 (E.D. Pa.), a 1963 decision which was reported no later than early 1964. Because, after reopening the consent order, the district court correctly granted summary judgment in favor of the United States on the original third-party complaint, we do not believe that this Court will find it necessary to consider whether the district court was in error in setting aside (over the Government's objection) the consent order of dismissal under Rule 60(b). However, we note in passing that that Rule may be invoked with respect to a consent order only in very limited circumstances; viz. an order which has been consented to may be set aside only for lack of actual consent, fraud in the procurement of consent, or lack of jurisdiction. Swift & Co. v. United States, 276 U.S. 311, 323-324. Accord: Thompson v. Maxwell Land Grant Co., 168 U.S. 451, 463; United States v. Babbitt, 104 U.S. 767, 768; Walling v. Miller, 138

F. 2d 629, 631 (C.A. 8), certiorari denied, 321 U.S. 784; Lustgarten v. Felt & Tarrant Mfg. Co., 92 F. 2d 277, 279 (C.A. 3); The Amaranth, 68 F. 2d 893, 895 (C.A. 2). See Martin Marietta Corp. v. Federal Trade Commission, 376 F. 2d 430, 433-434 (C.A. 7). Cf. Pope v. United States, 323 U.S. 1, 11-12.[2/] There was absolutely no suggestion by appellant in the court below that the consent order here was subject to any of these infirmities.

We now turn to the merits of the grant of summary judgment to the United States on the original third-party complaint.

1. The action of the district court in granting summary judgment in favor of the United States on the original third-party complaint, which sounded in tort, was plainly mandated by the express terms of 5 U.S.C. 757(b):

> The liability of the United States * * * with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States * * * to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States * * * on account of such injury or death * * * under any Federal tort liability statute. [Emphasis added.]

2/ Compare United States v. Gould, 301 F. 2d 353 (C.A. 5) (United States should have been allowed to attempt to prove a mistake of fact vitiating consent); Fleming v. Huebsch Laundry Corp., 159 F. 2d 581 (C.A. 7). In the latter case, the defendant's motion to set aside a consent judgment in a treble damage suit by OPA was held good because of the defendant's mistake of law concerning OPA regulations, when those regulations comprised more than 50,000 pages and were difficult to obtain. Professor Moore says of this case: "This decision results from the obvious hardship and injustice presented by the particular facts; but, as pointed out in the decision, in the usual case a party having the benefit of counsel will be held to a consent judgment agreed to with full knowledge of all the facts." 7 Moore, Federal Practice ¶ 60.22 [2] at p. 233 (2d Ed. 1966).

It is difficult to envisage any way in which Congress could have more clearly evinced an intent to preclude the imposition of tort liability against the United States in the present circumstances. Manifestly, what is involved here is an attempt "to recover damages from the United States * * * on account of [the] injury" which was sustained by the government employee. The gravamen of the third-party complaint was, after all, that, as lessee of the building at the time of the accident, the Government was responsible for the maintenance of the elevator and, therefore, could be subjected to liability, in the form of contribution, for the injury which the government employee had received (and on account of which she had obtained compensation under the FECA). That it is appellant, rather than the employee herself, who is seeking to impose this liability upon the Government scarcely makes it any less an endeavor to recover damages "on account of [the] injury to her."[3/]

It need be added only that it was not an irrational legislative judgment that the Government's statutory liability for the payment of compensation to an injured employee should not merely provide the exclusive remedy of the employee himself but,

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3/ Our reading of Section 757(b) is directly supported by the Third Circuit's decision in Drake v. Treadwell Construction Co., 299 F. 2d 789, as well as by Busey v. Washington, 225 F. Supp. 416 (D. D.C.) and Christie v. Powder Power Tool Corp., 124 F. Supp. 693 (D. D.C.). It is true that, as appellant notes (Br. p. 10), the Supreme Court remanded Treadwell to the Third Circuit "for further consideration in light of Weyerhaeuser Steamship Co. v. United States, 372 U.S. 597" (372 U.S. 772). For reasons to be developed, infra, pp. 15-17, Weyerhaeuser does not support the maintenance of the third-party complaint in tort here.

as well, stand in place of all other governmental liability to anyone on account of that injury and under any tort liability statute. To the contrary, giving effect to its plain terms, Section 757(b) simply carries out one of the long-acknowledged fundamental purposes of workmen's compensation statutes. As expressed by Mr. Justice Brandeis in Bradford Electric Co. v. Clapper, 286 U.S. 145, 159, "* * * [T]he purpose * * * [of most workmen's compensation acts] is to provide * * * not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate."[4] (Emphasis added.) As this Court has stated, "* * * [A]nything that tends to evade the exclusiveness of either the liability or the recovery strikes at the very foundation of statutory schemes of this kind, now universally accepted and acknowledged." Smither & Co., Inc. v. Coles, 100 U.S. App. D.C. 68, 242 F. 2d 220, 222, certiorari denied, 354 U.S. 914.[5]

4/ Obviously, to permit a third-party action for contribution or tort indemnity would be wholly inconsistent with this objective.

5/ As pointed out by Larson:

> There are three general types of "exclusive liability" clause which, for present purposes, must be carefully identified with the cases that depend upon them; from the narrowest to the broadest, they are as follows: The Massachusetts type, which only says that the employer, by coming within the Act, waives his common-law rights; the California and Michigan type, which say that the employer's liability shall be "exclusive", or that he shall have "no other liability whatsoever"; and the New York type, which carries this kind of

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2. Albeit on a somewhat different basis, the courts of appeals have uniformly recognized that the exclusive liability provisions of the Federal Employees' Compensation Act preclude the imposition of tort liability against the United States in the circumstances of this case. See e.g., United Airlines v. Wiener, 335 F. 2d 379 (C.A. 9), certiorari dismissed sub nom. United Air Lines v. United States, 379 U.S. 951; Wien Alaska Air Lines v. United States, 375 F. 2d 736 (C.A. 9), certiorari denied, 389 U.S. 940; Maddux v. Cox, 382 F. 2d 119 (C.A. 8).

Wiener, for example, involved a mid-air collision in Nevada between a United Airlines plane and a military aircraft. Wrongful death actions were brought against United by, inter alia, the representatives of several civilian government employees, who were traveling on the commercial aircraft in the performance of their official duties. Alleging that the accident was occasioned by the negligence of the United States,

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5/ [Continued from previous page]

> statute one step further by specifying that the excluded actions include those by "such employee, his personal representatives, husband, parents, dependents, or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death."

2 Larson, Workmen's Compensation § 66.10 (1952).

5 U.S.C. 757(b) is of course of the "New York" type. The Tenth Circuit, in discussing the effect of the exclusive liability clause of the Federal Employees' Compensation Act in Underwood v. United States, 207 F. 2d 862, 864, made the following observation: "it is significant, we think, that the Congress chose to speak in terms of liability of the government, not in terms of remedies or rights of action, and in doing so, it gave a right of action only to the extent that it saw fit to relax governmental immunity from any liability."

United filed a third-party complaint seeking non-contractual indemnity from the Government.[6]

The Ninth Circuit held expressly that, in view of the FECA, United was not entitled to such indemnity. While not adopting the Government's contention (discussed, pp. 9-11, supra) that the claim for indemnity was barred by the provision in 5 U.S.C. 757(b) precluding suit by "anyone otherwise entitled to recover damages from the United States * * * on account of such injury or death", the Ninth Circuit concluded that the claim could not be asserted because the exclusive liability provision "removed the underlying [tort] liability [running from the United States to its employees] necessary for indemnity." 335 F. 2d at 403. The court pointed out (335 F. 2d at 403) that "neither contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor to the person injured",[7] and relied principally upon cases holding that the "indistinguishable" exclusive liability provision in Section 5 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 905, removed

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6/ Although called "indemnity" the recovery sought was grounded, under Nevada law, in tort. 335 F. 2d at 398. Such non-contractual "indemnity" is, for the purposes of the present case, governed by the same principles as contribution in tort. See Brown v. American-Hawaiian S.S. Co., 211 F. 2d 16 (C.A. 3); Crawford v. Pope & Talbot, 206 F. 2d 784 (C.A. 3). See Slattery v. Marra Bros, Inc., 186 F. 2d 134, 138-139 (C.A. 2), certiorari denied, 341 U.S. 915.

7/ This is a universal requirement for recovery in contribution or non-contractual indemnity. Yellow Cab Co. of D.C. v. Dreslin, 86 U.S. App. D.C. 327, 181 F. 2d 626; see Prosser, Torts § 47 at p. 277; § 48 at p. 281, fn. 10 (3d ed. 1964).

the underlying liability of the employer to the employee which is necessary to hold the employer liable for contribution or non-contractual "indemnity".

Within the last year, in Wien Alaska, the Ninth Circuit was asked to reexamine Wiener. There, as in Wiener, a government employee was killed by reason of the crash of a commercial aircraft in which he was a passenger in the performance of his official duties. Upon being sued by the employee's widow, the owner and operator of the aircraft sought tort indemnity from the United States on the theory that the accident had been caused by the negligence of an air traffic controller. The district court dismissed the third-party complaint and the Ninth Circuit affirmed on the authority of Wiener. On November 6, 1967, certiorari was denied.

Even more recently than the Ninth Circuit's reaffirmation of Wiener in Wein Alaska, the Eighth Circuit reached the same conclusion in Maddux v. Cox, supra. That case involved a collision between a private automobile and a government vehicle. The driver of the private automobile was held liable to the Navy serviceman who was a passenger in the government vehicle, and sought contribution from the United States on the ground that the driver of that vehicle was also negligent. The Eighth Circuit ruled that contribution was not available because the United States could not have been held liable to the serviceman-passenger in view of Feres v. United States, 340 U.S.

135. [8] It cited as support for this ruling both Wiener and Wien Alaska. 382 F. 2d at 124.

3. Contrary to appellant's belief, Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, does not advance its position. The sole question there decided was "whether the historic admiralty rule of divided damages in mutual fault collisions has been qualified * * * by the exclusive liability provision of the federal compensation statute" (372 U.S. at 600). That the admiralty rule of divided damages is not at all equivalent to the rule allowing contribution is apparent from the Ninth Circuit's discussion in United Air Lines v. Wiener, supra, 335 F. 2d at 403, of why Weyerhaeuser was inapplicable to that case:

> The admiralty rule of divided damages is to be distinguished from the rule of [non-contractual] indemnity urged upon us by United since under admiralty law there arises from a collision involving mutual fault the right to apportionment of all damages resulting therefrom, including personal injuries, cargo damage, and damage to the ships. The divided damage rule is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured. [9]

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[8] The principle of Feres -- that the United States is not liable in tort for injuries to servicemen arising out of or in the course of activity incident to their service -- is, of course, the military counterpart of the exclusive liability provisions of the FECA applicable to civilian government employees who are injured in the performance of their duties.

[9] That this rule of divided damages in collision cases is sui generis and not a general rule of contribution is demonstrated by Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282, which holds that the historic rule of divided damages in maritime law is limited to mutual fault collisions and that there is no contribution under maritime law in personal injury actions. See The North Star, 106 U.S. 17.

Accord: Busey v. Washington, 225 F. Supp. 416, 420-423 (D. D.C.).

Thus, Weyerhaeuser, in holding that the exclusivity provision did not qualify the divided damages rule to which private shipowners and the United States alike had long been subject, clearly did not decide whether an employer would be liable for contribution in tort where he did not share a common tort liability with the party seeking contribution.

The appellant relies upon the statement in Weyerhaeuser that "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties * * *." 372 U.S. at 601. That language is not, however, a holding that a third party may not be affected by the exclusivity provision in circumstances where exclusivity clauses traditionally have negated contribution or tort indemnity actions. However much legislative history on the admiralty rule of divided damages may be lacking, there is surely no reason to suppose that Congress intended the exclusivity provision it inserted in the FECA in 1949 to yield different and less effective protection than the similar provisions of other statutes, as construed in numerous judicial decisions over many years prior to 1949. See cases cited in 2 Larson, Workmen's Compensation Law §76.21.[10/] The

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10/ We stress again that, as pointed out in Busey v. Washington, 225 F. Supp. 416, 423 (D. D.C.), to permit a third party to recover indemnity in such circumstances would undercut the purpose of the FECA -- or of any similar workmen's compensation system -- to provide not only for employees "a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." Bradford Elec. Co. v. Clapper, 286 U.S. 145, 159.

Senate Report accompanying the 1949 legislation observed:

> * * * needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill. S. Rep. No. 836, 71st Cong., 1st Sess. (1949), p. 23.

We submit, therefore, that the Ninth Circuit in United Air Lines v. Wiener, supra, and Judge Pine in Busey v. Washington, supra, were correct in holding that the rule in Weyerhaeuser does not apply to an action for contribution against the United States under the FECA.

In this connection, it should be noted that the petition for certiorari in the recent Wien Alaska case was based in large measure upon the proposition that the Ninth Circuit's decision was in "direct conflict" with Weyerhaeuser. See petition for a writ of certiorari, No. 496, Oct. Term 1967, pp. 6-14. The Supreme Court, however, apparently did not regard the contention to be worthy of consideration since it denied the petition. 389 U.S. 940.[11/]

4. Nor should this Court accept appellant's invitation to go into conflict with the Ninth and Eighth Circuits on the basis

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11/ Hart v. Simons, 223 F. Supp. 109 (E.D. Pa.), is to the contrary, but that case placed far too much weight upon the Weyerhaeuser dicta, and is clearly wrong. In addition, in that case the plaintiff rather than the Government sought dismissal of the third-party complaint. The Government did not waive its right to contend at a later stage that the FECA barred the suit for contribution. Hart and Simons ultimately settled their suit, and the settlement provided that the third-party complaint be dismissed. Thus the Government paid nothing. Civil No. 27953 (E.D. Pa.), Stipulation of Dismissal filed November 2, 1964.

of the dissenting opinion in Smither & Co., Inc. v. Coles, 100 U.S. App. D.C. 68, 242 F. 2d 220. First, of course, we believe that the majority decision in that case was correct, as it properly recognized that the "keystone" of workmen's compensation legislation is the exclusiveness of the remedy. 242 F. 2d at 222. In any event, the dissent in Smither dealt only with the question of whether Section 5 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 905, excludes the right of the worker's spouse directly to sue the employer for loss of consortium. The issue in the present case is quite different. What is involved here is the Government's liability in tort for the injury sustained by the employee herself, for which she was entitled to receive (and in fact did obtain) compensation benefits. And the question is simply whether, even though the United States may not be required to respond in damages for that injury in a direct suit brought by the employee, liability nevertheless may be imposed indirectly through the conduit of a fortuitously present joint tortfeasor. The Smither dissent, which recognized that the entire "cluster" of rights surrounding the employee is barred by the statute, surely does not suggest that the public purse can be reached indirectly in circumstances where it cannot be reached directly.[12/]

12/ In this connection, appellant's reliance (Appellant's Brief, pp. 10, 12) upon an analogy to Martello v. Hawley, 112 U.S. App. D.C. 129, 300 F. 2d 721, is difficult to understand. Appellant suggests that the present action is similar to a suit for contribution by one joint tortfeasor against another joint tortfeasor who has settled with the plaintiff. More specifically, appellant seems to contend that the policies which protect the finality of

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II

THE DISTRICT COURT CORRECTLY DISMISSED THE APPELLANT'S CLAIM FOR CONTRACTUAL INDEMNITY FOR LACK OF JURISDICTION.

For the reasons stated in Point I, supra, the district court correctly dismissed appellant's original third-party complaint which sought non-contractual contribution or indemnity from the United States. As previously noted, however, appellant also filed an amended third-party complaint in which, on the basis of the terms of the lease agreement between appellant and the United States, it was asserted that the Government could be required to indemnify appellant. In his brief, appellant invokes the doctrine of Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 to support that assertion.

There is no need to consider whether, as the Supreme Court found to be the case with respect to the stevedoring contract in Ryan, the lease agreement hereinvolved contains an express or implied contractual undertaking on the part of the Government to indemnify appellant for loss sustained because of faulty maintenance of the premises. For, even assuming the existence of such a contractual undertaking, it is enforceable only under the provisions of the Tucker Act, 28 U.S.C. 1346(a)(2). By virtue of

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such a settlement (McKenna v. Austin, 77 U.S. App. D.C. 228, 134 F. 2d 659) are analogous to the policies which protect the exclusivity of the employer's liability under a workmen's compensation act. Insofar as this analogy holds, however, Martello v. Hawley supports rather than weakens our contention that appellant's action for contribution will not lie against the United States, which has, under the FECA, "settled" with the original plaintiff.

the express terms of the Tucker Act, the jurisdiction of the district courts is restricted to claims not exceeding $10,000 in amount. Here the claim indisputably exceeds that amount; Mrs. Johnson's claim is for $100,000 and, in his amended third-party complaint, appellant asserts entitlement "to be fully indemnified by the [Government] for all sums that plaintiff may recover against [him]" (JA. 6).[13/]

Quite apart from the question of the amount in controversy, the district court lacked Tucker Act jurisdiction. The Supreme Court held in United States v. Sherwood, 312 U.S. 584, that a district court may entertain a Tucker Act claim not exceeding $10,000 only if the suit might also be brought in the Court of Claims. Since the Court of Claims may not consider claims which at the time of their assertion are wholly contingent in character, it follows that the district court could not entertain appellant's indemnity claim in advance of an adjudication of appellant's own liability. United States v. Sherwood, supra, 312 U.S. at 588, 591. In other words, the liability of appellant to Mrs. Johnson must be established before he may commence a

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13/ Appellant endeavors to avoid (Br., p. 14) the express limitation on district court jurisdiction under the Tucker Act by asking this Court to speculate on the possibility that Mrs. Johnson will not actually recover a judgment in excess of $10,000. Appellant assigns no good reason, and we know of none, why the Court should indulge in such conjecture -- particularly since Mrs. Johnson alleges "severe and permanent injuries" to several parts of her body (JA. 1). It should be noted in this regard that appellant was obviously unwilling to restrict his indemnity claim to $10,000.

claim for contractual indemnity against the United States, either in the district court or in the Court of Claims. See also Herder Truck Lines v. United States, 335 F. 2d 261 (C.A. 5).

Finally, the suggestion of appellant that the contract action may be maintained as an "ancillary" claim under Rule 14, F.R. Civ. P., without regard to the limitations of the Tucker Act, is utterly without merit. After pointing out that the Federal Rules of Civil Procedure cannot "modify, abridge or enlarge the substantive rights of litigants or * * * enlarge or diminish the jurisdiction of federal courts," the Supreme Court stated in Sherwood:

> * * * [T]he matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government. 312 U.S. at 590-591. [Emphasis added.]

In sum, the requirements for jurisdiction under the Tucker Act were not met by the amended third-party complaint, and the district court properly dismissed it.

CONCLUSION

In the light of the foregoing, the judgment of the district court should be affirmed.

Respectfully submitted,

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